

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

STEPHANIE ROSENFELD, * Case No. 17-CV-07299 (NGG)
*
Plaintiff, * Brooklyn, New York
* June 7, 2018
*
v.
*
TARA LENICH, *
*
Defendant. *
*
* * * * *

TRANSCRIPT OF CIVIL CAUSE FOR INITIAL CONFERENCE
BEFORE THE HONORABLE PEGGY KUO
UNITED STATES MAGISTRATE JUDGE

APPEARANCES:

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Proceedings recorded by electronic sound recording, transcript produced by transcription service.

1 (Proceedings commenced at 10:36 a.m.)

2 THE CLERK: The Honorable Magistrate Judge Peggy Kuo
3 presiding. Civil cause for initial conference docket no. 17-
4 CV-7299, Rosenfeld versus Lenich.

5 Counsel, please state your name for the record,
6 starting with plaintiffs.

7 MR. SHAPIRO: Good morning, Your Honor. Sam
8 Shapiro, Emery Celli Brinckerhoff & Abady, for the plaintiff.
9 I'm here with my colleague, Richard Emery, and our summer
10 associate Ryan Wheeler.

11 THE COURT: Good morning.

12 MR. EMERY: Good morning.

13 MS. GARMAN: Good morning, Your Honor. For the City
14 defendants, Assistant Corporation Counsel Ashley Garman and
15 with me is my colleague, Barry Myrvold.

16 MR. MYRVOLD: Good morning.

17 THE COURT: Good morning.

18 MR. CREIZMAN: Good morning, Your Honor. Eric
19 Creizman for Tara Lenich.

20 THE COURT: Okay. Good morning.

21 So we're here to figure out what we're going to do
22 about discovery and what that timetable will look like. I
23 know you've had a conference already with Judge Garaufis and
24 there's some dispute as to what the scope of the discovery is
25 that he authorized.

1 The way I read the transcript is that the scope
2 somewhat's changed and that's why there's somewhat conflicting
3 statements. Judge Garaufis' original concern was about
4 identifying potential other victims so that their potential
5 claims would not run outside the statute of limitations.

6 But then toward the end there was an issue raised I
7 believe by counsel for the defendant Lenich about other
8 discovery and so Judge Garaufis basically said, okay, fine, go
9 to the magistrate judge and figure this all out. Okay? So
10 that's how I read it.

11 So we're here to try to figure it all out. And it
12 may not be that you get all the discovery you want within the
13 time frame that you want, but I think we should set out a
14 sequence for how that discovery should happen and then figure
15 out what the timetable will look like. Okay? So I think
16 that's the best way to proceed.

17 So, first, I need to see if I understand the case.
18 So this action's being brought by the plaintiff against not
19 only the defendant -- the individual defendant Lenich for the
20 wiretapping activity, but also against the City of New York
21 and some of her supervisors, and then also some individuals.

22 And as I understand it, part of the claim is about
23 the wiretapping itself, and then the other part of the claim
24 is about disclosures.

25 I understand that the state court staff and justice

1 are not named, and I also realize that the federal
2 investigators are not named, but the disclosure to those
3 parties are listed as an -- acts allegedly violative of the
4 Electronic Communication Privacy Act.

5 So I guess there are two areas I want to explore.
6 One is the one that Judge Garaufis talked about which is the
7 potential victims. And those victims would be the people who
8 are on the other side of the communications. So in other
9 words, the plaintiff's communications were tapped, but she was
10 talking to someone else. And so what you're looking for is
11 who those someone elses are.

12 Is that right, Mr. Shapiro?

13 MR. SHAPIRO: That's correct, Your Honor. We are
14 looking for that. In addition to that though, we don't want
15 any discovery to be limited to just the phone numbers that
16 were --

17 THE COURT: Well, no. But I'm just trying to figure
18 out the scope, right?

19 MR. SHAPIRO: Yes.

20 THE COURT: So you want to find out --

21 MR. SHAPIRO: We are certainly looking for that.

22 THE COURT: -- who those people are?

23 MR. SHAPIRO: Yes, Your Honor. Absolutely.

24 THE COURT: Okay. And then on the other side, it
25 sounds like you're also looking for who else the defendants

1 may have shared this information with and that would
2 constitute a violation.

3 So in other words, let's put aside the official
4 disclosures to investigators and the state court, or even the
5 communications that you know has been shared within certain
6 people so that this matter could have been referred to the
7 federal investigators for prosecution, you're looking also for
8 who else may have been privy to the contents of the
9 communication in an inappropriate way.

10 And let's just put that -- let me characterize it as
11 people passing around private communications and laughing,
12 having a good laugh about it. All right?

13 MR. SHAPIRO: That's fair, Your Honor. I think in
14 addition we don't know the status currently of these
15 communications. We believe they may be just still be on the
16 District Attorney's Office server and accessible.

17 THE COURT: Okay. Right.

18 MR. SHAPIRO: Yes. Absolutely.

19 THE COURT: So that's what I'm just trying to figure
20 out is that there are two categories of information that
21 you're trying to get. Right?

22 MR. SHAPIRO: At least two. But, yes, certainly
23 whether --

24 THE COURT: Well, what's the other?

25 MR. SHAPIRO: Well, all of discovery are you talking

1 about or just related to who else --

2 THE COURT: Well, okay. So those are the things
3 that seem -- all right. So then you have everything else you
4 want, right?

5 MR. SHAPIRO: We do want to proceed with discovery,
6 Your Honor.

7 THE COURT: Right. Okay.

8 MR. SHAPIRO: Yes, correct.

9 THE COURT: Okay. Let me just focus on those two
10 things --

11 MR. SHAPIRO: Okay.

12 THE COURT: -- because those seem more pressing for
13 purposes of the complaint. All right. Because they may lead
14 to additional parties and allegations. Okay.

15 So then let's -- let me find out from the City, do
16 you -- does that sound right in terms of categorizing areas
17 that are being requested at the beginning?

18 MS. GARMAN: It sounds right that those are what are
19 being requested. We certainly would object to, at this point
20 in time, being required to produce all of that information,
21 given that it's our position that no claim has been stated
22 against any of the City defendants under the ECPA.

23 So it's our position that, especially with the
24 second category, it's completely, you know, sort of
25 inappropriate to be engaging in that discovery at this point.

1 THE COURT: Okay. But the -- you represent not just
2 the City of New York, but also individuals?

3 MS. GARMAN: Correct.

4 THE COURT: All right. So when you say the City
5 defendants, do you mean everybody?

6 MS. GARMAN: Yes.

7 THE COURT: Okay. Not the -- excluding Ms. Lenich?

8 MS. GARMAN: Yes. Sorry.

9 THE COURT: Yes. Okay. But the issue of who the
10 other let's say victims were was explicitly something that
11 Judge Garaufis was concerned about. So why can't you turn
12 over the information as to who were the counter parties to
13 these telephone conversations?

14 MS. GARMAN: Your Honor, I mean, we just -- we
15 generally object to the notion of us turning over discovery in
16 order for Mr. Shapiro to solicit additional clients, but --

17 THE COURT: But it's not soliciting additional
18 clients.

19 It is -- if at some point in the discovery, let's
20 say, you know, months later after the motion to dismiss has
21 been decided, and let's assume that there's still a viable
22 case, okay, and that information is turned over, at that
23 point, if the defendant -- if the plaintiff then seeks to
24 amend the complaint to add additional plaintiffs, that seems
25 like we've wasted a lot of time not knowing who they were

1 because that's going to happen anyway. That's information
2 that's going to come out in discovery.

3 MS. GARMAN: Yes, Your Honor. And with that
4 specific -- with this first category of information that would
5 elucidate other potential victims, we certainly recognize that
6 that is explicitly what Judge Garaufis contemplated being
7 exchanged at this stage.

8 So we don't -- you know, sort of over our objection
9 we sort of -- we recognize that that, you know, is discovery
10 that could take place now. Very different with respect to the
11 second category.

12 THE COURT: Okay. So let me hear about that.

13 MS. GARMAN: Certainly. And I guess just -- I guess
14 I'll preface all of this with saying we do somewhat disagree
15 with Your Honor's interpretation of what the -- what occurred.

16 THE COURT: I'm only saying the allegations. I'm
17 not saying that people sat around in a room and laughed about
18 it.

19 MS. GARMAN: Okay.

20 THE COURT: I'm just saying the allegation is that
21 there were improper disclosures.

22 MS. GARMAN: Yes.

23 THE COURT: And so I'm just putting it in the --
24 setting aside the official disclosures, which were discussed
25 at the conference with Judge Garaufis, disclosing to the

1 federal investigators, disclosing to the court, the state
2 court, just putting those things aside, there seems to be --
3 there seem to be allegations that the communications were
4 shared with other people and that was improper.

5 And so that's why I very flippantly said, you know,
6 let's suppose that people did have that -- have these
7 communications and shared it in a room and laughed about it,
8 that would be improper.

9 And so I'm not saying it happened, but to find out
10 who shared this information might elucidate whether they, you
11 know -- I don't know whether they would then become a party
12 somehow or that would then lead to further amendments to the
13 complaint.

14 MS. GARMAN: Understood, Your Honor.

15 I was actually referring to Your Honor's
16 interpretation of the proceedings before Judge Garaufis.

17 It seems clear that Judge Garaufis was contemplating
18 limited discovery out of a concern of a potential running of
19 statute of limitations while briefing was going on.

20 And that the issue is really, you know, he wants
21 parties to be able to narrow the claims in this case and
22 narrow what the claims are before full fledged discovery goes
23 on.

24 And I think in reference to a concern raised by Mr.
25 Creizman that he would somehow be prejudiced because he also

-- his client also needed immediate discovery of a similar
urgency to that of the issue with this running of the statute
of limitations, her potential victims, Judge Garaufis seemed
to contemplate, well, I'm not going to prohibit you from
getting things that are of equal urgency.

6 So our position is that Judge Garaufis very clearly
7 limited this initial discovery to what is absolutely needed.
8 And the only specific example of that that was discussed at
9 the conference was what was needed to identify potential
10 additional victims.

11 THE COURT: No. So I'll read you the transcript.
12 Okay?

13 So toward the end of the proceedings, Mr. Creizman
14 stands up and says, "The only thing that concerns me is
15 whether Your Honor is issuing some sort of stay of discovery
16 against the City." And he discusses some of his concerns.
17 And Judge Garaufis says, "Well, I am not saying anything that
18 would prohibit the magistrate judge from giving you reasonable
19 opportunity."

20 And then he says, "But obviously if you're not happy
21 with the outcome, you can always come to appeal." So he's not
22 issuing -- he specifically is saying he's not issuing a stay
23 of discovery.

24 And so from my perspective, I'm in a position to
25 consider whatever is valid. And I'm not saying I'm going to

1 open discovery full blast, but I think there is -- there's
2 room for us to have a well thought out plan for discovery so
3 that the parties can get what they need early so that we don't
4 have delays in terms of amendments, bringing in parties, any
5 of that, so that we can get that all sorted out early on in
6 the case.

7 And, of course, in making those determinations, I
8 will be weighing the proportionality and the difficulty and
9 the need for the information, but I'm going to look at what
10 makes sense in terms of disclosing that information early in
11 the case rather than later. All right?

12 So that we're not stuck, you know, several months
13 down the line with a brand new, amended complaint because
14 there wasn't information that was given early on.

15 So, for example, there are John Does named. So
16 perhaps this would be a good time to see whether these John
17 Doe potential names, if they exist, could be disclosed. Okay?

18 That's what I'm trying to say is that I'm not -- I
19 understand the victims' issue was clearly on the table, but I
20 do not read what Judge Garaufis was saying to say you are
21 limited, because there was a specific question asked about a
22 stay of discovery and he said no. All right?

23 So we're going to talk about it. And whether I
24 ultimately rule that it should be turned over or not, is
25 something that we can have a discussion about.

1 And if you don't like my ruling, you can go back to
2 Judge Garaufis, but I don't think that we're limited today to
3 talking about just the victims. So I just want to get that
4 issue off the table. Okay?

5 MS. GARMAN: Yes, Your Honor. And we just wanted to
6 note our position.

7 I will answer your specific question now which was
8 our position with respect for the second category of the ECPA
9 discovery.

10 Our position is that, again, that there has been no
11 claim, no viable claim asserted against the City or any of the
12 City-represented defendants under the ECPA and, therefore,
13 without having stated a claim, the plaintiff is not entitled
14 to any discovery.

15 You know, it's obviously well settled that you
16 cannot get discovery in order to state a claim. You need to
17 first state a claim to be able to unlock the doors of
18 discovery.

19 And here especially -- I mean, I know Your Honor
20 said setting aside the disclosures to the U.S. Attorney's
21 Office and to the Court so I won't address those because our
22 position on those is very clear.

23 With respect to whatever other allegedly
24 inappropriate transmissions I guess within the Kings County
25 DA's Office that are being alleged, there is nothing in the

1 complaint -- there's no factual content that specifies times,
2 dates, individuals, anything like that. Everything there is
3 pledged upon information and belief.

4 And it is our position that that is not sufficient
5 to unlock the doors of discovery to a fishing expedition with
6 which then they could attempt to try to, you know, get the
7 information they need.

8 In the first instance, they have to state a claim,
9 which is the purpose of us making this motion to begin with.

10 THE COURT: All right. So then let me hear from Mr.
11 Shapiro as to what your specific claims are in that regard,
12 rather than just conclusory statements.

13 MR. SHAPIRO: Yes, Your Honor. So I'll put aside
14 the allegations with respect to the disclosures to the
15 Department of Justice and the State Supreme Court.

16 We do allege in the complaint that there was
17 disclosure that Your Honor stated amongst the Kings County
18 District Attorney's Office. Admittedly we don't know when
19 those disclosures took place or to whom they were made.
20 There's no way for us to know that information. We need to
21 discover. We need --

22 THE COURT: But what makes you think that that
23 happened?

24 MR. SHAPIRO: Well, one thing we know that has
25 happened since we filed the complaint, we appeared before a

1 state supreme court justice, spoke with a Kings County
2 district attorney who had reviewed communications that our
3 plaintiff was on.

4 We didn't know that before when we filed the
5 complaint, but that has subsequently happened. There's no
6 reason to believe that others haven't reviewed it as well.

7 THE COURT: But that sounds like it was reviewed in
8 the course of turning -- in the course of complying with a
9 court order to turn it over.

10 MR. SHAPIRO: I don't know that. Maybe it was.
11 Maybe it was reviewed beforehand.

12 THE COURT: But that's what you just told me --

13 MR. SHAPIRO: It was --

14 THE COURT: -- that the information you got was
15 pursuant to the court order.

16 MR. SHAPIRO: No. The information I got was that
17 the district attorney reviewed all the communications. I
18 don't know that the Court ordered him to do that. I really
19 don't know that.

20 THE COURT: So you're saying that if there's an
21 allegation of misconduct within the office, the boss cannot
22 look at -- look into it?

23 MR. SHAPIRO: This was not a boss. This was a line
24 assistant district attorney --

25 THE COURT: Okay.

1 MR. SHAPIRO: -- who is a colleague of my plaintiff
2 I should also note.

3 THE COURT: Okay.

4 MR. SHAPIRO: And so who else reviewed it in the
5 office, we don't know. But we need discovery on that. And --

6 THE COURT: All right. So what you want is to find
7 out who reviewed it and then you can sort out whether it was
8 proper or not?

9 MR. SHAPIRO: We certainly want to know who reviewed
10 it. We want to know where it is now and who has access to it
11 because it may just be that it's on the server --

12 THE COURT: Okay. So let --

13 MR. SHAPIRO: -- and we want to know that.

14 We also want the contents of the communications
15 themselves. I want to be very clear about that.

16 And I think we have an obligation to do all we can
17 to receive that because I really cannot overstate how much
18 emotional damage this is causing my client to not know what of
19 her communications were intercepted, what was being said and
20 who was saying them.

21 And I think we have an obligation to try to mitigate
22 those damages so that she can see what, in fact, was
23 intercepted.

24 THE COURT: So one of the -- so I'd like to find out
25 from the City in a moment how this is all being stored now.

1 But one of my concerns with your approach is that if
2 all those communications are turned over to you, even in
3 attorney's eyes only, that that will then create a claim for
4 the counter parties to those telephone conversations to say,
5 look, now all these other people have seen these private
6 communications and that in itself is causing me humiliation
7 and harm.

8 MR. SHAPIRO: We don't believe so, Your Honor,
9 because the communications that are being turned over took
10 place between a third party and our client.

11 THE COURT: Yes. But you're --

12 MR. SHAPIRO: So our --

13 THE COURT: -- so I'm talking about the third party
14 who are your potential clients.

15 MR. SHAPIRO: I understand the concern, Your Honor.
16 Our client has a right to see those communications.

17 THE COURT: I understand that, so we can talk about
18 that, but you're asking for them to be turned over to you.
19 You said attorney's eyes only.

20 MR. SHAPIRO: We are, Your Honor. And we --

21 THE COURT: So that's different.

22 MR. SHAPIRO: Pursuant to a court order, we believe
23 that's permissible.

24 THE COURT: Well, but -- okay.

25 So let me find out from the City how are these

1 communications currently stored?

2 MS. GARMAN: Your Honor, my --

3 THE COURT: And what's the scope of them? How many
4 are there, et cetera?

5 MS. GARMAN: I can answer part of that. My
6 understanding is that they are stored in two ways. Just to be
7 very clear, the Kings County DA's Office takes the position
8 that these communications and everything else related to their
9 internal investigation of this incident are sealed and cannot
10 be accessed unless there is an unsealing order from the Court
11 or a 160.50 has been signed by Ms. Lenich. That's why we
12 provided --

13 THE COURT: Well, I think that's what's being
14 requested now.

15 MS. GARMAN: -- we provided that release but haven't
16 gotten a signed one back. So for that reason, no one is being
17 able to actually look at these --

18 THE COURT: Wait. Okay. Hold on. Let me -- sorry
19 to interrupt you.

20 Are you saying that you have given the plaintiff --
21 if the plaintiff -- because they are her communications --
22 that if she signs a release, that you can then turn it over?

23 MS. GARMAN: No. I guess there are sort of two
24 layers here. First, the Kings County DA's Office takes the
25 position that everything related to this investigation of Ms.

1 Lenich is sealed by operation of law because that
2 investigation did not result in a conviction. It was then
3 turned over to the U.S. Attorney's Office.

4 The DA's Office did its own internal investigation,
5 initially had Ms. Lenich arrested and charged. And so with
6 respect to all of their entire file on this case -- basically,
7 which includes the communications themselves, but also
8 includes an awful lot more -- their position is that they are
9 sealed and can only -- and it is Ms. Lenich who has to sign a
10 waiver to authorize the disclosure of those.

11 THE COURT: That's one route. The other is a court
12 order.

13 MS. GARMAN: Or a court order, of course.

14 THE COURT: Okay. All right.

15 MS. GARMAN: The other issue with respect to the
16 actual communications themselves, for the reasons that Your
17 Honor actually -- out of concerns that Your Honor pointed out,
18 you know, it would take -- certainly take a court order for
19 the Kings County DA's Office to even think about releasing
20 those. You know.

21 The irony does not escape defendants that, you know,
22 part of the claim against the City and the City defendants is
23 that they improperly disclosed these communications to other
24 law enforcement authorities, but then they would like us to
25 turn them over.

1 And as Your Honor said there are at least other
2 third parties who would be aggrieved persons under the ECPA.
3 And under Mr. Shapiro and Mr. Emery's theory, would have --
4 all would have claims against us if we just released these
5 communications.

6 So, no, it is not our position that Ms. Rosenfeld,
7 the plaintiff, could simply sign a release and we would be
8 able to give over the communications. That would absolutely
9 need a court order.

10 But there's just -- there's sort of two layers to
11 it. It's the 160.50 issue with respect to the overall
12 investigation. And then, you know, the issue with respect to
13 the actual communications and the ECPA issues.

14 THE COURT: Okay. So the 160.50 issue seems like an
15 alternative route for the release of the communications and
16 the file. A court order creates a different route. Right?

17 MS. GARMAN: I would say we need sort of -- we need
18 sort of both issues taken care of.

19 THE COURT: Why?

20 MS. GARMAN: Because the -- with respect to the --
21 the entire file, you know -- and again this sort of goes back
22 to I can't -- I don't know what is in the file or how many,
23 you know, hours or megabytes of information we're talking
24 about because all of that is sealed and no one is able to look
25 at it to give me those answers, but the Kings County District

1 Attorney's Office file related to their investigation of Ms.
2 Lenich contains a lot more than just the actual communications
3 themselves.

4 THE COURT: Right. Well, at the moment --

5 MS. GARMAN: So that, plus the unsealed --

6 THE COURT: Right. At the moment, all that's being
7 requested are the communications, not the file itself.

8 MS. GARMAN: Yes, Your Honor. But for anything in
9 that file, the DA's Office's position is that for anything in
10 that file to be released, whether it's communications or, you
11 know, pieces of paper, we either need a 160.50 release signed
12 by Ms. Lenich or Your Honor's explicit court order deeming
13 that that file unseal.

14 That is sort of a separate issue of then the
15 underlying communications which we would also submit that
16 regardless of the 160.50, we also need a court order. Because
17 again even when the DA's Office has had a grand jury subpoena
18 or a court order and has done the limited disclosure of these
19 communications, they're now here being sued for that.

20 THE COURT: Okay. So let me try to see what the
21 bottom line is of what you're saying. You don't know how big
22 this -- what the scope of the communications is? You can't
23 tell me how many there are because you don't have access to
24 them?

25 MS. GARMAN: Correct. I can tell you I do know that

1 they are stored at the DA's Office in two different ways.

2 They are on the hard drive under -- again all sealed, can only
3 be accessed, you know, again, only with a court order.

4 THE COURT: So no person has access to that?

5 MS. GARMAN: There are -- I believe there is an
6 administrator who given a court order could go in there. But
7 certainly absent that -- absent a court order, no, no one can
8 access it. But there is an administrator who would be able to
9 get the communications from the hard drive.

10 In addition, my understanding is that because there
11 was material turned over to the U.S. Attorney's Office
12 responsive to the grand jury subpoena, there is, I guess, a
13 hard copy of those. Of everything that was turned over,
14 there's also a hard copy. Same thing under seal --

15 THE COURT: When you say hard copy, what do you
16 mean?

17 MS. GARMAN: I don't specifically --

18 THE COURT: A thumb drive?

19 MS. GARMAN: I would assume either a thumb drive or
20 disks. Admittedly, I don't know. But in any event, something
21 separate from the hard drive. And again under seal, not to be
22 accessed by anyone.

23 THE COURT: Because it's Rule 6, grand jury
24 material?

25 MS. GARMAN: Yes. Among -- yeah -- in addition to

1 the other, you know, the other issues that I just mentioned
2 about, the 160.50 issue.

3 So no one is able to tell me exactly what there is
4 and how much there is until there is, you know, court orders
5 unsealing all of that. But my understanding again is that
6 it's stored in those two different ways.

7 THE COURT: Okay. So if the request were for you to
8 provide the names of who the third parties are, are you saying
9 you can't do it because there's no list and you or somebody
10 would have to listen to the conversations to get it? Or is
11 there a list?

12 MS. GARMAN: So again the answer is I don't know,
13 but with an explanation as to what I do know.

14 So with respect to what was turned over to the U.S.
15 Attorney's Office, these what I've called hard copies of
16 things, we don't know at this point in time just because it's
17 been several years -- and, again, no one's been able to go
18 back and look at this material because it's sealed -- we don't
19 know if this actually happened, but it is suspected that in
20 addition to turning over the actual communications, like the
21 recordings, the DA's Office may have extracted certain, I
22 guess, metadata, so the phone numbers that were picked up on a
23 given date and sent -- and they have also produced that. We
24 do not know if that happened --

25 THE COURT: Produced that to whom?

1 MS. GARMAN: To the U.S. Attorney's Office, which
2 would mean that that information would already have been
3 extracted and would somehow be -- would be contained in this
4 hard copy file.

5 If that did not take place, my understanding is that
6 one could, again, with a court order, access the hard -- the
7 hard drive -- the actual communications that are on the hard
8 drive and could extract phone numbers and I guess and dates.
9 I do not believe it would give names, but it would give phone
10 numbers and the dates of when the conversations with those
11 phone numbers occurred.

12 Beyond that, I don't know what other information can
13 be pulled, but I do know that there's a way to extract that
14 information.

15 Again, not knowing the scope of things, I do not
16 know how burdensome that would be or how much time that would
17 take. And again I don't know if it's already been done.

18 THE COURT: Okay. So it seems like as far as this
19 issue of the potential victims, what could happen is that you
20 get the phone numbers. Okay.

21 Yes. I realize I haven't had you speak.

22 MR. CREIZMAN: Sorry, Your Honor.

23 THE COURT: No, that's all right.

24 MR. CREIZMAN: I just want to --

25 THE COURT: Thank you for reminding me of your

1 presence, Mr. Creizman.

2 MR. CREIZMAN: Thank you. I appreciate that.

3 I just want -- I want to just make at least a point
4 on the record at this time about the plaintiff's request for
5 the wiretaps, the purposes of identifying other victims and
6 potential plaintiffs.

7 I think I -- we take no position really whether
8 plaintiff should be permitted to have the wiretaps. I'm not
9 sure what the statute says, but it seems as an equitable
10 matter, plaintiff was the one who was victimized by these
11 recordings and plaintiff should be able to have that.

12 My issue is for the purposes of identifying
13 potential plaintiffs, that's, I think, something I think
14 should be limited or prevented actually for a number of
15 reasons.

16 Number one, these wiretaps happened from June 2015
17 through January of 2016. As plaintiff's complaint plainly
18 says there was -- the effect of Ms. Lenich -- the discovery of
19 these wiretaps had an enormous impact on plaintiff within her
20 office, within the Brooklyn courts, with the law enforcement
21 and with defense lawyers who practice in those courts. So
22 that's number one. Okay.

23 And no one has come forward who has heard about that
24 and has said, okay, we want to join in this action. There's
25 been extensive media coverage since about not only what Ms.

1 Lenich did, but about plaintiff's civil case. In fact,
2 plaintiff's counsel has talked to the media on occasion.

3 And the U.S. Attorney's Office is in the course of a
4 sentence, preparing for sentence, probation -- the probation
5 department of the U.S. Attorney's Office are supposed to work
6 together to identify potential -- who are the victims of a
7 crime and get -- and solicit victim impact statements for
8 something else. No one other than plaintiff came forward and
9 I think that's telling.

10 And that raises the concern that by identifying
11 victims and then approaching them, people who are on these
12 calls, we are creating a claim that never existed, that the
13 plaintiffs are in a sense causing damage that never would have
14 happened had they not approached these people.

15 And you would -- and one would assume that most of
16 the people who spoke to plaintiff on the phone during that
17 time period know, pretty much can guess, that they might have
18 been captured on these recordings.

19 And one other additional point. I don't know what
20 the statute says about necessarily -- I'm still researching
21 this issue -- but a third party on a legal wiretap, I'm saying
22 an absolutely lawful wiretap, a third party who is captured on
23 a lawful wiretap doesn't have a privacy interest to suppress a
24 wiretap or to sue someone because they happen to have been
25 captured.

1 Now I understand that these were unlawful wiretaps.
2 But it seems to me that what -- if people -- what certain
3 people don't know -- and it seems like here a lot of people
4 would guess that they were captured -- but what certain people
5 don't know, let's say the plumber who plaintiff called to fix
6 a leak in the ceiling, that person -- maybe what that person
7 doesn't know won't hurt him or her.

8 And so that's why I am objecting. And I would like
9 the opportunity to brief the issue as to whether plaintiff
10 should have the wiretaps -- were to limit the use of the
11 wiretaps, so that it's not used for the purposes of soliciting
12 or informing other potential claimants. That's my piece.

13 THE COURT: Okay. All right. Thank you for that.

14 And I think that reminds me of a point as far as
15 these additional victims go. The allegations with regard to
16 the damages of the plaintiff have to do with humiliation and
17 et cetera.

18 And so there is a good point that what people don't
19 know didn't harm them. So if all these other third parties
20 have not come forward and said as a result of what happened
21 here they were humiliated or caused stress or whatever then,
22 you know, they haven't come forward. And certainly they would
23 have had an opportunity to come forward. So I do wonder about
24 that aspect of things.

25 MR. SHAPIRO: Your Honor, two points in response to

1 that. The first is that this whole scheme was not uncovered
2 until November of 2016, so nearly a year after all of these
3 wiretaps happened.

4 To say that these third parties would have
5 necessarily known that they were captured, would have
6 appreciated a phone call that they had with plaintiff a year
7 earlier, I think there's no way to know that. Yes. Perhaps
8 her mother spoke to her once a week or something like that,
9 but other parties --

10 THE COURT: I don't mean that point. I mean the
11 harm that your client is saying was caused to her was that
12 once the scheme was revealed somehow it became public.

13 And when it became public -- or, you know, that
14 people, that reporters were parked outside her apartment, that
15 she was being harassed, that her family was being harassed,
16 that her coworkers were looking at her funny, and so, you
17 know, all those things are a result of the disclosure of this
18 information.

19 And if the counter parties to those phone
20 conversations were having the same problem, we haven't heard
21 of them. And certainly if they did, I would assume you would
22 have heard from them. So that does cause in my mind a
23 question as to who else you think is -- not who else is on
24 phone calls, but who else was damaged.

25 MR. SHAPIRO: Well, I understand your point, Your

1 Honor. I think Congress, in enacting statutory damages under
2 the ECPA, there are specific statutory damages for every day
3 that a violation occurs, there's no need to show emotional
4 damage. There are statutory damages here. So our --

5 THE COURT: So you're saying the mere fact that
6 somebody was a counter party to an illegal wiretap means that
7 they're entitled to statutory damages?

8 MR. SHAPIRO: That's right, Your Honor.

9 THE COURT: I haven't looked into that issue, so I
10 don't know. But if you're alleging that, then that might be a
11 basis. Yes, Mr. --

12 MR. EMERY: Your Honor, if I may add to what my
13 colleague, Mr. Shapiro, has said.

14 I'm not -- I'm confused for the moment as to the
15 structure of what we're talking about because, number one, the
16 City has not made a motion to stay discovery. That's their
17 initial question. They have not done that before you and they
18 have the burden on that under the applicable case law that you
19 know better than I to show that there are compelling reasons
20 to stay discovery.

21 Secondly, with respect to their claims, they're
22 inherently, as you've already heard and already been able to
23 figure out from what you've said so far, these are deeply
24 factual issues as to whether the Monell claim stands as a --
25 she's a final authority figure to make the decisions about

1 wiretaps, or whether there was a policy in the office which
2 was so bereft of constitutional guarantees that it put people
3 in a position of being wiretapped without any protections by
4 the office itself, whether there were -- and whether it was
5 respondeat superior whether she's acting in the scope or not.

6 At her sentencing, on pages 25 and 27 of her
7 sentencing, she implies that she was doing this in a state of
8 emotional distress about her work in order to save a very
9 important case that she was handling at the time. These are
10 all very, very intense factual issues.

11 THE COURT: Okay. So, Mr. Emery --

12 MR. EMERY: Yeah.

13 THE COURT: -- what I understand my job is today is
14 to structure your discovery.

15 And it sounds like the City did try to make a motion
16 to stay before Judge Garaufis. My reading of the transcript
17 is that he denied it. And so -- but he asked me structure
18 this in a way that makes sense.

19 MR. EMERY: And I --

20 THE COURT: And so even though it's not a, well, if
21 your motion to stay has been denied, full steam ahead. I
22 don't read it that way. I read it as we're here to figure out
23 what makes sense.

24 MR. EMERY: And I completely agree with you. And I
25 was very heartened to hear your citation of the end of the

1 transcript because I think the upshot of what Judge Garaufis
2 said -- I was there -- was that you have the discretion.

3 THE COURT: Which is what I'm doing.

4 MR. EMERY: He is leaving it to you. Yes.

5 THE COURT: Right.

6 MR. EMERY: But the way we're fashioning this, if
7 you think about it, the way you're -- at least I'm hearing,
8 maybe I'm hearing it wrong and maybe you're --

9 THE COURT: I haven't ruled yet.

10 MR. EMERY: I know you haven't ruled yet. But there
11 are things that -- you said you've got the numbers, for
12 instance, you've got the phone numbers, that seemed reasonable
13 to you.

14 And what I'm wondering about is we need far more
15 than the phone numbers to properly conduct this case. And as
16 memories are lost as time goes on, we want to aggressively
17 pursue this case.

18 And what's more, our client on a daily basis,
19 suffers from not knowing what was -- she said in those phone
20 calls.

21 You know, at a minimum, you'd get her side of the
22 conversations, but I think you should get attorney's eyes only
23 under a court order, which doesn't create a claim by any third
24 party, all of those conversations that she was privy to.

25 The alternative here is that we file a class action.

1 And we don't really want to file a class action that asserts
2 that all of these people have statutory damage rights and that
3 we're going to have to identify the class.

4 THE COURT: Well, I don't --

5 MR. EMERY: And to handle it differently --

6 THE COURT: Well, I don't think under these
7 circumstances class action makes sense because the numbers are
8 readily identifiable. It's a question of when they will be
9 identified.

10 MR. EMERY: Well --

11 THE COURT: And what I'm hearing -- partly, I'm
12 trying to be very practical. Okay.

13 So that's why I'm trying to figure out what the City
14 has access to right now that they can give you without a lot
15 of trouble and then what kind of effort would be needed to
16 produce more. I'm not saying that they're not going to
17 produce it. I'm just trying to figure out when.

18 MR. EMERY: And just let me say as to that point,
19 it's completely unbelievable to me that they don't know the
20 scope and the details of this , because well before it was
21 turned over to the U.S. Attorney's Office, when they were
22 doing the investigation themselves at the Kings County
23 District Attorney's Office, they reviewed all this material.

24 THE COURT: The DA's Office may know.

25 MR. EMERY: Yes.

1 THE COURT: The assistant corporation counsel may
2 not know.

3 MR. EMERY: She has clients. They can tell her.

4 THE COURT: Well --

5 MR. EMERY: I mean --

6 THE COURT: Okay. So --

7 MR. EMERY: -- they're smart people over there.
8 They know what they have.

9 THE COURT: It's not about being smart.

10 MR. EMERY: Yeah.

11 THE COURT: It's about what information's being
12 conveyed. So you make a good point.

13 Has your client told you what the scope is? You've
14 told me you don't know. Is it one of those things where you
15 just haven't asked?

16 MS. GARMAN: Certainly not, Your Honor.

17 THE COURT: Okay.

18 MS. GARMAN: Again the issue is that all of this
19 material is sealed so no one can go back and look at it.

20 THE COURT: Right. But somebody did look at it,
21 right, before turn this over to the U.S. Attorney's Office?
22 So somebody knows the information?

23 MS. GARMAN: Years ago, yes, Your Honor.

24 THE COURT: Yes. Okay. So that's -- I think Mr.
25 Emery does make a good point that somebody knows how much

1 there is. So the fact that you haven't informed yourself as
2 to how much there is doesn't mean you, plural, don't know it.

3 MS. GARMAN: Yes, Your Honor. First of all, I don't
4 think that it's accurate to say that all of this material was
5 listened to. First of all, I don't -- I don't think anybody
6 at this point in time knows that.

7 Yes. At some point in time, obviously, someone knew
8 how much information was being turned over. But the issue is
9 we've certainly made inquiries and we have not been able to
10 find out. And it's not a matter of having someone just go
11 check the file because that's not possible.

12 THE COURT: Okay. So let me -- given this
13 discussion today and the gaps in knowledge, both factual and
14 perhaps legal, I think I need to have some further briefing on
15 the issue. Okay.

16 So the questions will be for the City to get their
17 arms around what is in these sealed files, not the content
18 necessarily, but, you know, what the scope of it is, how
19 difficult it is to get them, how they're stored, who has
20 access, the numbers of people, that kind of thing. Okay? I'm
21 not saying to go and listen to everything. I'm just saying
22 get your arms around what there is.

23 MS. GARMAN: When you say the numbers of people, you
24 mean physically how many people are these other potentially
25 other victims?

1 THE COURT: How many phone calls are we talking
2 about?

3 MS. GARMAN: How many -- okay.

4 THE COURT: I guess I misstated it, because I don't
5 -- I don't mean -- you know, these communications were between
6 the plaintiff and someone.

7 And so if you can find out how many someones there
8 are, that's great. If you can't, because all you have are
9 phone numbers -- I mean, right, a phone number can be listened
10 to by different people. If you're in a home, you call the
11 home, all the residents are potential parties to that, so I
12 get that.

13 So if you can say, you know, either how many
14 communications there are, or better yet how many discrete
15 phone numbers those communications were with, that would be
16 useful. Right? And so how they're stored, who's got access
17 to them. And you named a few of the barriers to disclosing,
18 but if there are other problems, you should let the Court
19 know. All right?

20 And then from the plaintiff's perspective, you need
21 to let me know why you need all of that information. Okay?
22 And if you are saying that it's a matter of equity because
23 your client should know everything that's there, you can make
24 that argument. I'll consider it.

25 If you're saying there's a statutory violation as to

1 the third parties because this is an illegal wiretap, and so
2 even if they don't know about it, they're entitled to damages,
3 then I'd like to hear that argument with legal citations.

4 And then, you know, if you have a proposal for -- on
5 both sides -- a proposal if you want to have a tiered or
6 staggered discovery as far as being able to get the
7 information in steps and why you need to do that, then that
8 would be useful too.

9 So, for example, if the City says we've got all the
10 phone numbers so we can turn that over fairly easily, even
11 though we don't want to, but to get the communications
12 themselves is difficult for XYZ reasons, then I'll hear those
13 reasons. Okay?

14 So I'd like that briefing on the question of the
15 communications and the information contained in those
16 communications.

17 But it sounds like for the moment they are in a
18 secure place. I want to have more details about how secure
19 that is. But it sounds like they're in a secure place, so
20 that give me some comfort. Okay. But I do think that counsel
21 for the City needs to be better informed about what's there.
22 All right?

23 MS. GARMAN: Yes, Your Honor. Just a couple of
24 things.

25 First, in order for us to be better informed and to

1 even make these inquiries, we will need a court order
2 explicitly stating that, you know, for the purposes of at
3 least this limited exercise those materials are unsealed and
4 should be looked at by members of the Kings County DA's Office
5 and corporation counsel.

6 THE COURT: Well --

7 MS. GARMAN: The position --

8 THE COURT: Okay. So Mr. Creizman's here. Would
9 your client permit, for purposes of this exercise, someone to
10 look into those files?

11 MR. CREIZMAN: Your Honor, I'm meeting with my
12 client next Saturday at the Federal Correctional Facility
13 Institution in Danbury.

14 So this issue is something that I've been
15 communicating with her about, but it's harder to do it outside
16 of the prison. So when I actually get there, I will have an
17 answer sometime on this Saturday.

18 THE COURT: All right.

19 MR. CREIZMAN: So I could actually -- after
20 Saturday, I'll be able to --

21 THE COURT: Bring a copy of the 160.50 with you and
22 see.

23 MR. CREIZMAN: Okay. Yes. Absolutely.

24 THE COURT: If she's giving permission, then a lot
25 of these problems are solved.

1 MR. CREIZMAN: Yes. Another thought, if I may --

2 THE COURT: Yes.

3 MR. CREIZMAN: -- is it possible for the Court to
4 issue an order to -- or a request that the U.S. Attorney's
5 Office Victim's Rights Coordinator, if they have discovered
6 information, if they have a list already drawn up, whether
7 they can turn that over to just the Court under seal and the
8 parties. Something along those lines might be useful in that
9 regard.

10 THE COURT: Okay.

11 MR. CREIZMAN: And if I have any other homework to
12 do, please let me know.

13 THE COURT: Okay. Well, that's a good idea too.

14 MR. CREIZMAN: Okay.

15 THE COURT: So if somebody wants to do that --

16 MR. CREIZMAN: I can --

17 THE COURT: -- then you can draw up a draft of
18 something for me to consider.

19 And also, Ms. Garman, if there's a draft order that
20 you think would be useful in giving you access, then that would
21 be useful, then please submit that as well.

22 MS. GARMAN: Yes, Your Honor. Certainly we will.

23 My other -- really just some points of clarification
24 as to the scope of what the communications are.

25 As Your Honor is probably aware, so this wiretapping

1 scheme involved not just the plaintiff but there was another
2 phone.

3 And so I just want to be clear that when we're
4 talking about identifying, you know, what communications there
5 are, we are only talking about Ms. Rosenfeld, the plaintiff in
6 this case, her -- the communications that were taken from her
7 phone, not the other person.

8 THE COURT: What is the other phone? What is the
9 other phone, another person?

10 MS. GARMAN: Yes. Another person who is not a party
11 to this case.

12 THE COURT: Another private person?

13 MS. GARMAN: Yes.

14 THE COURT: That person's private phone?

15 MS. GARMAN: Correct.

16 THE COURT: All right. Okay.

17 MS. GARMAN: So just we're clear --

18 THE COURT: That that makes --

19 MS. GARMAN: -- we're limited to the communications
20 taken from --

21 THE COURT: -- that makes sense to me.

22 MS. GARMAN: Okay. And --

23 THE COURT: But let me just find out. I hear --

24 MR. SHAPIRO: Let me just --

25 THE COURT: -- chatter on the plaintiff's side.

1 MR. SHAPIRO: Yeah. Let me just make sure I
2 understand. Our position is certainly that we're entitled to
3 all communications that our client was party to that were
4 taken from the other phone as well.

5 THE COURT: Okay. Well, so if -- let me get some
6 clarity on that. This other phone, if that other phone was
7 communicating with the plaintiff, then that is probably
8 something that should be turned over.

9 MS. GARMAN: Understood, Your Honor.

10 THE COURT: Or should be considered as part of this
11 exercise.

12 MS. GARMAN: We would just point out that that --
13 those communications on this other individual's phone, that
14 included another party, the plaintiff, they will not elucidate
15 anything about other potential victims because we know who the
16 two parties are. They were this other person whose phone it
17 was and the plaintiff. So if the exercise --

18 THE COURT: But that's information that at some
19 point will be turned over?

20 MS. GARMAN: Yes. Yes, Your Honor. But I'm just
21 saying in terms of staging discovery, and if the limited
22 purpose of this exercise is to identify additional victims,
23 that those communications will not help.

24 The only other issue --

25 THE COURT: But the only thing I would say for that

1 is I want you to get the information on that from the get go
2 so that I can make that consideration. It may be that it's
3 not disclosed early on, but I want you to become informed as
4 to the status of those other communications.

5 MS. GARMAN: Meaning how many phone calls, text
6 messages, whatever there were?

7 THE COURT: Yes.

8 MS. GARMAN: Okay. And, yes, again, another point
9 is that they were talking about both oral communications, so
10 actual recordings of conversations. And also one of the
11 phones there were text messages, so I'm --

12 THE COURT: So wiretaps can take -- can record text
13 messages?

14 MS. GARMAN: No. There was additional -- in
15 addition to actually physically doing the wiretaps, my
16 understanding is that there were grand jury subpoenas and
17 search warrants that were fabricated and sent out to
18 telecommunication providers to get text messages and other
19 things.

20 THE COURT: So everything that's the subject of the
21 wiretap, the search warrants, the subpoenas. So I think that
22 all falls within the scope of the communications because all
23 of those are potentially part of the fraud, right?

24 MS. GARMAN: Okay. Yeah. I just wanted to make
25 sure --

1 THE COURT: Yes.

2 MS. GARMAN: -- because we're talking about
3 communications and I just wanted to be clear what we're --

4 THE COURT: Yes. We've been talking wiretap and
5 phone calls. But yes, thank you for clarifying. And yes, I
6 do think all of that falls within the scope. And if you need
7 to parse them out, go ahead and do that.

8 But what I'm concerned about in terms of our being
9 able to have some finality today is that you don't know
10 enough. And I know that there have been barriers to it.

11 But I think the most important thing is that you
12 start to learn more about the case so that we could have these
13 conversations and for me to then fashion an order that makes
14 sense.

15 So I want you to get a good view of all the
16 communications. And what part of it gets turned over is
17 something that I will consider after I've seen everything.
18 But at the moment, I can't even talk about it because I don't
19 -- you can't tell me what we're, you know, what we're talking
20 about specifically. Okay.

21 MS. GARMAN: Understood, Your Honor. And I think
22 the approach makes sense. I just want to make sure that we're
23 clear so we do this one time.

24 THE COURT: Yes.

25 MS. GARMAN: And so --

1 THE COURT: Yes. That's why I'm making it very
2 broad at the beginning.

3 MS. GARMAN: But the communications are limited to
4 those involving Ms. Rosenfeld, the plaintiff, as one party.

5 So we're not talking about this other phone
6 communications that that person might have had with his
7 mother, aunt, you know, other people. We're just talking
8 about ones with which plaintiff was a party?

9 THE COURT: In the first instance, that is what we
10 are talking about.

11 MS. GARMAN: Okay.

12 THE COURT: But it behooves you to understand more
13 so that if we get to that place you are prepared to talk about
14 it.

15 MS. GARMAN: Yes, Your Honor. Thank you.

16 THE COURT: Okay. Yes.

17 MR. SHAPIRO: Just to clarify, Your Honor. So
18 you're directing us to put this in the briefing that you're
19 ordering today, is that right?

20 THE COURT: Yes.

21 MR. SHAPIRO: So we'll be privy to this information
22 as well?

23 THE COURT: Yes.

24 MR. SHAPIRO: Okay. Great. And it's -- in our
25 view, this should include not just the numbers, but the number

1 -- the length of calls, if they can get that information, the
2 number of text messages that were exchanged. We need to know
3 really the scope of this.

4 THE COURT: Well, that's what I've asked for is the
5 scope.

6 MR. SHAPIRO: Okay. I just wanted to clarify that.

7 THE COURT: So I don't know whether the length of
8 the phone calls is -- whatever the -- you made mention of
9 metadata, so you can just describe what the metadata would
10 show.

11 MR. SHAPIRO: And that would include --

12 THE COURT: So you don't have to give me a list of
13 all the phone numbers, all the phone calls and the length. I
14 don't need that at this moment.

15 I just need to know that you know it so that you can
16 talk about the scope. If you tell me there are 10,000 of
17 them, that's going to be different from saying there are 10.
18 Right? At the moment, I don't know. And you don't know?

19 MS. GARMAN: Right. Right. So just to be clear,
20 you're not asking us to say, okay, there were 10,000 phone
21 calls, and here are the parties to each one, and this is the
22 date. You just want us to ascertain, yes, okay, there were
23 ten. You know, the --

24 THE COURT: And tell me how difficult it will be to
25 generate that.

1 MS. GARMAN: Right.

2 THE COURT: I'm not asking to actually generate it
3 now because maybe it's difficult.

4 MS. GARMAN: Right.

5 THE COURT: I don't want to impose that burden at
6 the beginning, but I just need for you to be able to talk
7 knowledgeably and describe what is there. And then if it
8 turns out it's going to be easy, it already exists, then, you
9 know, once I weigh the proportionality, I might say it's easy,
10 just turn it over.

11 But if you tell me it's going to take months with
12 outside vendors or whatever, then, you know, that might be a
13 different issue. But at the moment, like I said, I just don't
14 have the information.

15 MS. GARMAN: Yes, Your Honor.

16 THE COURT: All right. So you need to tell me the
17 information.

18 I'm not telling them to generate that information
19 yet because I don't know how difficult it is. Okay?

20 So just provide that information. Get yourself
21 informed.

22 So the first step is, if there are barriers to you
23 getting information, create what you think is necessary as an
24 order. I'll look at it. It's going to be filed on -- a
25 proposed order on the public -- all of this is public filings.

1 Okay. Because at the moment we're not talking about anybody's
2 names. We're not talking about the content. So this is all
3 public.

4 So just file it as a proposed order and I'll look at
5 it. And if it's good, I'll sign it and then that will open
6 the door for you to get that information.

7 If Ms. Lenich provides authorization, then that's
8 another avenue for you to, you know, rely on.

9 And then I would like to get briefings by everybody
10 on the things that I've asked you to brief on. And then I'll
11 give each side a time to respond to each other. And then I'll
12 look at it and I think I'll have a better idea of what to do
13 as far as the communications.

14 Now we haven't even talked about the other side,
15 which is who had access. Is that information that you can
16 readily ascertain? Ms. Garman?

17 MS. GARMAN: I --

18 THE COURT: Because you've told me that this
19 information was very, very corralled. And so it would seem to
20 me that if people were taking pains to make sure that it --
21 that that wasn't a lot of access, that it would be easily
22 ascertainable as to who did have access. So I think you
23 should get that information. Okay?

24 MS. GARMAN: Okay. I do not know how easy it will
25 be to get that information. I mean, we can -- just note our

1 objection to, at this point in time, you know, engaging in
2 that kind of discovery, but I will -- I will look into --

3 THE COURT: Well, I note your objection.

4 But like I said before, it's important to understand
5 -- if the allegations are that the information -- the
6 communications were given to people who were not supposed to
7 get them, you know, just to use a very generic description,
8 then they -- there may be other claims. Right? And so I
9 think it's important to get that out up front.

10 So I want you to ascertain who had access to this
11 information, and then you can make an argument as to, you
12 know, whether it should be disclosed at a point when you have
13 better information.

14 Because if you say these people were the only ones
15 who looked at it, then we're done. But if you say, you know,
16 there were clerks who might have looked at it, or there were
17 people who photocopied things -- you know what I mean -- it's
18 just if you can't -- or it was shared with somebody maybe at
19 another DA's office to get their input -- I don't know, I'm
20 just making that up -- but we don't know.

21 So again we're trying to deal with this issue in a
22 vacuum without knowledge. So I want you to be informed as to
23 who may have had access to this other information and then we
24 can talk about it.

25 MS. GARMAN: Okay. So Your Honor is not ordering us

1 to produce that information?

2 THE COURT: No. I just want you to know so that you
3 can make arguments on it. And then when you make those
4 arguments, the other side will have a chance to argue against
5 it.

6 MS. GARMAN: Yes, Your Honor.

7 THE COURT: All right. But I can't -- I'm supposed
8 to -- in these discovery -- in the new world of discovery, I'm
9 supposed to make proportionality considerations. And so I can't
10 do that if I don't know what this entails and how important it
11 is to you. I have an inkling of why it's important to you,
12 but I need to see.

13 You know, if you tell me it's impossible, you know,
14 it's really difficult or whatever -- or you might come back
15 and say the answer is no, zero, nobody else had access other
16 than these named people, then we're done. We don't have to
17 keep chasing this.

18 But if there are other people, then I think we can
19 have a discussion about whether those -- providing those names
20 is important in this case. Okay?

21 MS. GARMAN: Yes, Your Honor. So you'd like that
22 also sort of in our briefing?

23 THE COURT: In the briefing, yes. Okay.

24 So let's now turn to timing. So today is June 7th.
25 How much time do you think you'll need to brief this?

1 MR. SHAPIRO: Is the City going to be brief -- are
2 we going to be responding to the City's brief?

3 THE COURT: Let me think about this.

4 So the City is the one with the information and
5 you're the ones who are saying you need it. Okay. Yeah. I
6 think so. I think it's the City that will need to make the
7 first filing, and then you can make your legal argument as far
8 as why you need it in your response.

9 So, Ms. Garman?

10 MS. GARMAN: Your Honor, we'd ask for three weeks.

11 I mean, we do need some time to get the appropriate
12 order and then discuss with the appropriate folks at the DA's
13 office how this is to be done.

14 THE COURT: Okay. So three weeks gets us to June
15 28. And I'll call it a motion for protective order.

16 And then how much time will the plaintiff need?

17 MR. SHAPIRO: Yeah. I was just looking at my
18 schedule, Your Honor. I'd like to do this quickly. Could we
19 have until July 13th?

20 THE COURT: All right. And then how much time will
21 you need to reply? Is a week enough?

22 MS. GARMAN: Your Honor, I do apologize. I was just
23 looking at the calendar. So our motion papers for the motion
24 to dismiss are due June 29th. So we would actually ask, in
25 light of that, for four weeks.

1 THE COURT: So a week after that date deadline?

2 MS. GARMAN: Yeah.

3 THE COURT: All right. So --

4 MS. GARMAN: I apologize.

5 THE COURT: That's okay. So a week after that would
6 be July 6.

7 MS. GARMAN: Okay.

8 THE COURT: July 4th is a holiday. I hope that
9 doesn't cause a problem.

10 MS. GARMAN: Fine.

11 THE COURT: Okay. There will be fireworks
12 regardless. Okay.

13 So then if it's July 6th, is it then July 20th for
14 you or more than that, Mr. Shapiro?

15 MR. SHAPIRO: No, that's fine.

16 THE COURT: All right. July 20th. And then?

17 MS. GARMAN: A week to reply.

18 THE COURT: The 27th. Okay.

19 So at that point, I will look at everything. If I
20 need further argument, I will schedule that shortly
21 thereafter. And if not, I'll just make a ruling on the
22 papers. Okay? So that's for that first part.

23 At that point, I think we can look at what other
24 discovery might be in order.

25 MR. SHAPIRO: Well, Your Honor, on that point, we

1 believe discovery against at least Ms. Lenich should go
2 forward. She's answered the complaint. There's really no
3 reason for a stay to stay that discovery.

4 THE COURT: So what are you asking her to produce?

5 MR. SHAPIRO: Well, we would like to take her
6 deposition for starters. At least an initial deposition so we
7 can get some information. We really don't have a lot of
8 information. We'd like to do that.

9 We also would like -- I'm not sure how many
10 documents Ms. Lenich has, but the City is in possession of a
11 lot of documents that are relative to the case against Ms.
12 Lenich. I mean, we believe we should be able to take
13 discovery --

14 THE COURT: But what I'm hearing is that all of that
15 is what is sealed as part of her files. So if she's in
16 control of it, then either she'll give authorization for it to
17 be released or she can release it herself.

18 MR. SHAPIRO: I understand. There are -- certainly
19 I understand you're dealing with the stuff that is sealed.
20 And that I understand from Ms. Garman today that that
21 encompasses all the investigation material.

22 THE COURT: Yes.

23 MR. SHAPIRO: I don't know whether that encompasses
24 materials, communications that Ms. Lenich had over the course
25 of the 18 months that she was conducting this wiretap scheme.

1 THE COURT: Communications with?

2 MR. SHAPIRO: With other ADA's in the office about
3 the wiretap scheme and how she actually did it, whether there
4 were emails to other ADA's directing them to take actions
5 relevant to the wiretap scheme. I'm not sure that that is
6 sealed. I'm not sure why those emails would be sealed.

7 Other emails that may exist between Lenich and
8 others, that is certainly information at the very least. And
9 there may be more stuff that we would want from the City.

10 I recognize that you're dealing with the sealed
11 investigation materials separately, but other communications
12 we think we should be entitled to now. And certainly a
13 deposition of Ms. Lenich And potentially document requests to
14 Ms. Lenich. I don't know what she has, but we'd like to
15 determine that.

16 THE COURT: Okay. Yes.

17 MR. CREIZMAN: I want to object to an initial
18 deposition of Ms. Lenich, to try to work something out with
19 plaintiff so that we can avoid what really would be a
20 tremendous burden on Ms. Lenich of having her two depositions
21 in federal prison, and not to mention some potential security
22 issues for her if she's exposed in some way, shape or form.

23 THE COURT: Yes.

24 MR. CREIZMAN: And I had talked to plaintiff's
25 counsel before this appearance and we did discuss that we

1 would try to figure out a way short of a deposition if we can
2 get the answers that they need.

3 And I think we can continue to do that and don't
4 have to join issue on this particular dispute right now.

5 If so, I mean, I'm happy to brief it or whatever we can do.

6 THE COURT: Okay.

7 MR. CREIZMAN: But I think there's a way.

8 THE COURT: That sounds good. Okay.

9 MR. CREIZMAN: Okay.

10 THE COURT: So what it sounds like is that, Mr.
11 Creizman, you're not asking for a complete stay on discovery?

12 MR. CREIZMAN: No. I mean, if Your Honor issued a
13 complete stay, then of course I would not oppose. But if Your
14 Honor is ordering a full -- discovery against Ms. Lenich, I
15 think that Ms. Lenich needs documents from the City as well,
16 because then we can't really defend our case.

17 THE COURT: All right. Okay. So here's what I'll
18 say as far as Ms. Lenich.

19 Since it sounds like you're okay with proceeding
20 with discovery, why don't the parties -- why don't counsel try
21 to work what makes sense for you. Okay? So you can make some
22 initial -- exchange some initial interrogatories, some initial
23 document exchanges and requests.

24 And then to the extent that any of those requests
25 would entail Ms. Lenich seeking the documents from some other

1 party, including some other entity, either third parties or
2 the City, then we can have a further discussion about those on
3 a motion to compel.

4 Yes, Ms. Garman.

5 MS. GARMAN: I think Your Honor probably
6 anticipated, you know, we would sort of object to -- you know,
7 it sounds like all other parties are looking to the City to
8 produce documents.

9 And I think that goes back to the heart of Judge
10 Garaufis' concern that if discovery is taking place while
11 briefing is happening, it's going to delay the --

12 THE COURT: Well, I'm --

13 MS. GARMAN: -- ability to really narrow down the
14 issues.

15 THE COURT: All I'm talking about right now is Ms.
16 Lenich's discovery.

17 MS. GARMAN: Right.

18 THE COURT: And so if she needs discovery from you,
19 then that can be brought. I mean, I'm assuming there's
20 certain things that she can disclose without involving the
21 City. So if she can just disclose it, she should just do
22 that.

23 But if there are things that involve the City, then
24 those issues can be raised as they arise. And by the time
25 these issues come up, I think you'll be done with your

1 briefing.

2 MS. GARMAN: Okay.

3 THE COURT: Okay?

4 MS. GARMAN: Thank you.

5 THE COURT: Yes, Mr. --

6 MR. EMERY: And I do think we can work well with Ms.
7 Lenich's counsel.

8 I would say this, however. I do think the case
9 would be expedited quite a bit if we had a short deposition in
10 Danbury -- at Bedford or wherever it is --

11 MR. CREIZMAN: Danbury.

12 MR. EMERY: Danbury.

13 THE COURT: So you --

14 MR. EMERY: -- and to work out a short deposition
15 and then we could even contemplate, given the schedule here,
16 that any other further deposition, within the seven hours
17 allotted, we obviously hold to that, could be done after she
18 is released. Because she's going to be released in the next
19 many months, so I do think realistically that's viable.

20 THE COURT: Whatever the parties want to agree to is
21 fine.

22 MR. EMERY: Okay.

23 THE COURT: And if Mr. Creizman and his client are
24 fine with it, then go ahead and do that. But I'm not going to
25 order that it be done because it's a little bit irregular. So

1 I think if you can work it out, great. If you want me to
2 order it, then you need to make a motion.

3 MR. EMERY: Well, I understand. But I don't -- I
4 don't understand why there has to be an order. They've
5 answered. We're doing this in the normal course. We would
6 note their deposition.

7 THE COURT: Well, you're asking for two depositions.

8 MR. EMERY: Well, I'm --

9 THE COURT: Because you called it an initial
10 deposition.

11 MR. EMERY: I'm asking for to use seven hours and
12 use a portion of it one day and then the rest of it later.

13 THE COURT: Okay. So that like I said, if Mr.
14 Creizman agrees to it, great, go ahead and do it. If he
15 doesn't agree to it, then you do need me to order it.

16 MR. EMERY: Okay.

17 THE COURT: And at the moment, I don't have enough
18 information to make that decision. It doesn't sound like
19 you're even asking me yet, because if Mr. Creizman agrees --

20 MR. EMERY: We will work -- we'll try and work it
21 out.

22 MR. CREIZMAN: I think we've been able to so far
23 work with --

24 THE COURT: Great.

25 MR. CREIZMAN: -- the other side. We will be able

1 to work something out.

2 THE COURT: Okay. Fantastic. Glad to hear that.

3 All right.

4 So, Mr. Emery, is there anything else?

5 MR. EMERY: No. We're good. Thank you.

6 THE COURT: Okay. Ms. Garman, you were standing.

7 MS. GARMAN: I'd just like to know that with respect
8 to any deposition that's going on, I mean, the City and the
9 City defendants are still a party so we would, you know, be
10 able to weigh in on that --

11 THE COURT: Weigh in on participating or on it going
12 forward?

13 MS. GARMAN: Oh, no. I mean, our position is that
14 it shouldn't go forward, but I just want to make it clear that
15 we should also be part of the conversation.

16 THE COURT: Well, sure, that's fine. But I think in
17 terms of it not going forward, I'm not sure that it makes
18 sense for me to say that it shouldn't go forward. But if you
19 want to be there, of course you can be there. See what I'm
20 saying?

21 Because whether or not it goes forward doesn't have
22 anything to do with whether the City's motion to dismiss is
23 successful. In fact, if you're successful, then you would be
24 excluded from that deposition.

25 And I'm saying that at the moment you're right. You

1 are in this case and so you're entitled to be at the
2 deposition. But you're not entitled to say the deposition
3 shouldn't go forward.

4 MS. GARMAN: Yes, Your Honor.

5 THE COURT: Right? Because if you want to depose,
6 that's a separate issue. That's a completely separate
7 deposition.

8 If you're seeking a City -- I'm not saying you have
9 to, but I'm just saying that that's not the issue. The issue
10 isn't about your deposition. It's about the plaintiff's
11 deposition of Ms. Lenich.

12 MS. GARMAN: Yes, Your Honor. Understood.

13 THE COURT: Okay. All right. So I think we've got
14 a timetable. And after this issue -- I just want to get this
15 issue done with and then we'll talk about what happens after.
16 Okay?

17 So I'm going to proceed in a structured way, but I'm
18 not -- I'm not staying the discovery, but we're going to move
19 forward by steps focusing on the things that are important at
20 the beginning and leaving things that can wait, I suppose,
21 until a later point.

22 But I just want to get my arms around this issue
23 because I don't think if anybody really knows enough about it,
24 including me. You don't know enough about it to educate me in
25 a way that allows me to make a ruling. Okay?

1 So we've got those deadlines in place for the
2 pleadings -- I will -- for the briefing. I will deal with
3 this expeditiously so that everybody can keep moving forward.

4 All right. Any questions?

5 ALL COUNSEL: Thank you, Your Honor.

6 THE COURT: All right. Thank you.

7 (Proceedings concluded at 11:44 a.m.)

8 I, CHRISTINE FIORE, court-approved transcriber and certified
9 electronic reporter and transcriber, certify that the
10 foregoing is a correct transcript from the official electronic
11 sound recording of the proceedings in the above-entitled
12 matter.

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15 _____
16 June 21, 2018

17 Christine Fiore, CERT
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